IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Criminal Revision Application No.178 of 1997

Kiroloskar Cummins Ltd. Petitioner
Vs.
Mayur Jamnadas Vora & anr. Respondents

Mr.Amit Desai with Mr.Prakash Naik and Gopal Shenoy for petitioner.

Dr.S.S.Tatkare, APP for State.

CORAM: B.H.MARLAPALLE,J.

Reserved on : Janaury 16, 2007.
Pronounced on: January 23, 2007.

JUDGMENT :

1. This Criminal Revision Application is filed by the original accused no.1 - Company under Section 401 of Cr.P.C. against the judgment and order passed by the learned Addl. Sessions Judge at Pune on 31/3/1997 in Criminal Revision Application No.152 of 1992 filed by the original complainant under Section 399 of Cr.P.C. The complainant who is impleaded as present respondent no.1 had filed S.C.C. No.963 of 1990 for offences punishable under Section 629-A of the Companies Act, 1956 alleging that the accused no.1 - Company and accused no.2 had acted in contravention of Sections 297(1) and 299 of the said Act. This complaint was filed on 2/6/1990 and the learned Judicial Magistrate, First Class at Pune by taking cognizance of the complaint issued the order

of process on the same day i.e. 2/6/1990.

2. The accused no.1 - Company on receipt of summons consequent to the order of process passed by the learned Judicial Magistrate, First Class filed an application at Exhibit 21 in Criminal Case No.963 of 1990 praying for quashing the order of process and dismissing the complaint on the grounds that the complaint was filed beyond limitations as set out under Section 468 of Cr.P.C. and there was no application for condonation of delay filed with the said complaint so as to exercise the powers under Section 473 of Cr.P.C. for condoning delay. This application was filed on 24/7/1991. The original complainant filed an application at Exhibit 23 on or about 10/1/1992 and prayed for condonation of delay and relied upon the judgment of this Court in the case of P.D.Palkhandwar & ors. vs. Siddayya Shivamurtaya Hiremath & anr. **[1985 Cri.L.J. 1017]**. The learned JMFC by his order dated 21/2/1992 allowed the application at Exhibit 21 filed by the accused no.1 - Company and dismissed Summary Criminal Case No.963 of 1990. Consequently accused were discharged and their bail bonds were cancelled.

3. The order dated 21/2/1992 passed by the JMFC came to be challenged in Criminal Revision Application No.152 of 1992 by the original complainant and by the impugned judgment and order the learned Addl. Sessions Judge agreed that the trial Court was right in dismissing the complaint as being time barred in view of Section 468 of Cr.P.C. but in view of the contentions in complaint (para no.6) and also in view of the application at Exhibit 23 preferred by the complainant, the delay in filing the complaint deserved to be condoned and, therefore, the revision application was allowed by setting aside the order passed by the trial Court on 21/2/1992. The complaint was directed to proceed as per law and expeditiously.

4. The learned counsel for the accused-company / petitioner submitted that the view taken by the learned Addl. Sessions Judge is contrary to law and the impugned order is passed without jurisdiction. It was submitted that in a complaint filed belatedly on 2/6/1990, it was not permissible for the trial Court to issue process by taking cognizance unless delay was condoned and the order of process was passed without condoning delay. If the learned Addl.

Sessions Judge was satisfied that the trial Court was right in holding the complaint to be time barred, he did not have the powers to proceed further and condone the delay by himself because even the process order issued by the trial Court was without jurisdiction in as much as unless the delay was condoned the said order could not have been passed. In such circumstances, it was not permissible for the learned Addl. Sessions Judge to take upon himself as the trial Court and allow the application for condonation of delay when such an application was not filed with the main complaint before the trial Court. In support of these contentions the learned counsel has relied upon the following decisions:

. (i) Jethmal Himmatmal Jain & ors. v. State of Maharashtra **[1981 Cri.L.J. 1813]**, (ii) R.C. Trivedi & anr. v. A.H. Paranjape & anr. **[1982 Cri.L.J. 869]** and (iii) Kathamuthu vs. Balammal **[1987 Cri.L.J. 360]**.

. On behalf of the respondent - complainant none is present and this revision application has been already dismissed against the respondent no.2 - original accused no.2.

5. Thus the only issue that calls for consideration is whether the learned Addl. Sessions Judge was justified in condoning delay in view of the averments made in para 6 of the complaint and the application filed at Exhibit 23, after the accused no.1 - Company had filed an application at Exhibit 21 for dismissal of the complaint on the ground that it was time barred. In para 6 of the complaint the complainant had stated as under:

> "I say that there is no bar of limitation under the provisions of the Criminal Procedure Code, 1973. I say that the facts and record being in possession of the accused No.2, other directors, principal officers and the accused No.1 company, it is in the interest of justice that delay, if any, deserves to be condoned. The offences are of serious nature in as much as the shareholders monies, interest and the company's property, capital and interests are involved."

In para 3 of the application at Exhibit 23, the complainant in support of his prayer for condonation

of delay stated thus:

> "It is submitted that the process having been granted, no application is required. However, out of abundant caution, the Complainant states that for reasons already on record of this Hon'ble Court, delay, if any, may kindly be condoned in the interest of justice. This application be treated as an application for condonation of delay."

6. This Court in the case of State of Maharashtra v. P.D. Pujari **[1979 Cri.L.J. 1152]** held that a prosecution cannot be actually instituted unless the following sine quo non stand fulfilled :

(a) an offence has been committed;

(b) its commission has become known; and

(c) its offender is identified.

. In the instant case the complainant had approached this Court in Writ Petition No.2487 of 1989 which was filed on 28/7/1989 and in the said

petition he had prayed for directions against the Union of India and the Secretary, Union of India in the Ministry of Industries - Department of Company Affairs so as to prevent from entertaining hearing and/or granting the application filed on 26/6/1989 which application was filed for approval under Section 297(1) of the Companies Act, 1956. In the said petition it was contended by the complainant that the accused no.2 was appointed as Director of the accused no.1-company on 10/11/1986 and he became the Managing Director of the said company on 13/12/1986. His wife was running two industrial firms viz. M/s. Kay Industries and M/s. P.K. Industries and during the period from 10/11/1986 to 19/1/1989 the accused no.1 company had some transactions for purchase of goods from the said two firms and the accused no.2 had not disclosed that his wife was a partner in the supplier companies and that the accused never applied to the competent authority under Section 297(1) of the Companies Act for seeking prior approval. It is thus clear that the complainant had the knowledge regarding the illegalities / offences committed by the accused and punishable under Section 629-A of the Companies Act, 1956 as on 28/7/1989. The said Writ Petition was

allowed to be withdrawn by expressly keeping open the liberty to move a fresh petition in the event of future exigencies if so warranted. In the complaint before the trial Court the allegation was again the same that the accused no.l - company had transactions for supplies of different material by the two firms in which the wife of accused no.2 was a partner, between the period from 10/11/1986 to 19/1/1989. By filing the writ petition before this Court the complainant himself demonstrated his knowledge about these transactions as on 28/7/1989. Under Section 629-A the punishment is only of fine and, therefore sub-section (2)(a) of Section 468 of Cr.P.C. was attracted to the complaint in as much as the complaint was required to be filed, at the most, within a period of six months from 28/7/1989 i.e. on the day Writ Petition No.2487 of 1989 was filed by the complainant before this Court. As noted earlier the complaint has been filed on 2/6/1990 and thus not within limitations.

7. The order of process issued by the trial Court on 2/6/1990 is based on the verification and does not deal with the issue of delay. This order clearly demonstrates that the learned JMFC presumed that the

complaint was not hit by limitations and mechanically passed the order of issuing process and thus two different illegalities were committed viz. (i) a complaint filed beyond time was entertained, and (ii) order of process was issued in a complaint filed beyond limitation and without condoning delay even though in para 6 the complainant had purportedly prayed for delay condonation, if the complaint was hit by limitations. Thus under these circumstances, we have to examine the legality of the order passed by the learned Addl. Sessions Judge. A Division bench of Madras High Court in the case of Kathamuthu (Supra) stated :

> "In any case, the exercise of the power under Section 473, extending the period of limitation by condoning the delay in launching the prosecution, should precede the taking cognizance of the offence. ... . While so exercising such discretionary power, the court is obliged to record its order in writing, giving its reasons therefor. In our opinion, any proceeding culminating in the conviction of a person in a criminal case, the cognizance of which has been taken after the

> expiry of the period of limitation as prescribed under Section 468(2) without first resorting to Section 473, is non est in the eye of law."

. In the case of Jethmal Himmatmal Jain (Supra) this Court held that in condoning delay without hearing the accused, there would be a breach of the basic principle of natural justice since a valuable right to the accused by the statute was being affected. The accused not having been given any opportunity to show cause why the delay should not be condoned or why cognizance should not be taken in the interest of justice there is travesty of justice and cognizance taken by the learned Magistrate was illegal.

. In the case of R.V. Trivedi (Supra) this Court held:

> "The consistent view is that the delay could not be condoned under the provisions of Sec. 473 of Cr.P.C. as a matter of course and after the cognizance of the offence is taken. The act of taking cognizance of the offence

itself becomes and act without jurisdiction unless the Court concerned examines the question of limitation under Section 468 of Cr.P.C. either upon a request by the party or on its own accord and, as far as possible, after hearing the opposite party, and decides judicially to grant extension of limitation in that particular case."

8. In the instant case at the threshold there was no application for condonation of delay when the complaint was placed before the trial Court on 2/6/1990. Para 6 of the complaint opened with the contentions that the doctrine of limitation was not applicable to a complaint filed under the Criminal Procedure Code and subsequently it was prayed for condonation of delay by way of abundant caution. The application at Exhibit 23 was filed on 10/1/1992 and after the accused no.1 - company filed an application at Exhibit 21 praying for dismissal of the complaint on the ground that it was time barred. There was no justification given in this application as well, as to why the delay was required to be condoned and in any case the application was filed after the Court had taken cognizance by issuing process. As noted

earlier, the issuance of process order without condoning delay and in a complaint filed beyond limitations itself was illegal. It has also come on record that when Writ Petition No.2487 of 1989 was allowed to be withdrawn the accused no.2 had resigned from the post of Chairman and Managing Director of the accused no.1 - company. The accused no.2 would be an affected party though he did not approach the revision Court and the present petition has been dismissed against him. Under Section 473 even otherwise the Court may take cognizance of an offence after the expiry of period of limitation if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interest of justice. Neither in the complaint nor in the application at Exhibit 23 the complainant had explained properly the delay nor did he make out a case that it was necessary to do so in the interest of justice. Though this revision petition has been pending for the last about ten years, the original complainant did not bother to cause his appearance and contest the challenge to the impugned order passed by the learned Addl. Sessions Judge. This also shows that the original complainant has lost his

interest in prosecuting the complaint.

9. In the premises, the revision application succeeds and the same is hereby allowed. The impugned order dated 31/3/1997 passed by the the learned Addl. Sessions Judge, Pune in Criminal Revision Application No.152 of 1992 is hereby quashed and set aside and the order dated 21st February 1992 passed by the learned Judicial Magistrate, First Class, Pune is hereby confirmed.

(B.H.MARLAPALLE,J.)